Muriithi v Kanyingi (Environment and Land Appeal 86 of 2023) [2024] KEELC 4966 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4966 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND APPEAL 86 OF 2023

YM ANGIMA, J

JUNE 20, 2024

BETWEEN

LEONARD GITHUI MURIITHI .... APPELLANT

AND

JENIFFER WAMAITHA KANYINGI .... RESPONDENT

(Being an appeal against the judgment and decree of Hon. P. Gichohi (CM) dated 18.05.2022 in Nyahururu CM ELC No. E121 of 2019)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. P. Gichohi (CM) (as she then was) dated 18.05.2022 in Nyahururu CM ELC E121 of 2019 – Jeniffer Wamaitha Kanyingi -vs- Leonard Githui Muriithi. By the said judgment, the trial court allowed the Respondent's suit and ordered the Appellant to transfer the suit property to the Respondent. The trial court also issued a permanent injunction to restrain the Appellant from sub-dividing, transferring, selling, alienating, charging or dealing with the property other than for the purpose of transferring the same to the Respondent. At the same time, the trial court dismissed the Appellant's counterclaim.

B. Background

2. The record shows that vide a plaint dated 24.12.2019 the Respondent sued the Appellant before the trial court seeking the following reliefs:

    a. That the Appellant be compelled to sign transfer forms in favour of the Respondent.

b. General damages for trespass and a permanent injunction do issue against the Appellant, his agents, employees, servants or any person claiming through him from sub-dividing, transferring, selling, charging, alienating or in any manner interfering with Title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ndemi Ngai Ngeithis/2355.

c. Costs of the suit.

d. Any other relief the court may deem fit to grant.

3. The Respondent pleaded that in the year 1995 the Appellant had sold her a plot to be excised from the suit property. She further pleaded that on 21.03.2017 the Appellant sold her another plot to be excised from the suit property but he had since refused and neglected to transfer the said plots to her. It was further pleaded that despite issuance of a demand and notice of intention to sue the Appellant had failed to make good her claim hence the suit.

4. The Appellant filed an undated defence on 27.01.2020 denying the Respondent's claim in its entirety. He denied having sold any plots out of the suit property to the Respondent as alleged or at all. He denied having signed any sale agreement with the Respondent and pleaded that the copy attached to the Respondent's pleading was fraudulent.

5. It was the Appellant's defence that, in any event, the copy of the purported sale agreement did not indicate the parcel number the subject of the sale and that it was null and void for want of consent of the land control board. The Appellant denied having received any purchase price as indicated in the Respondent's supporting documents. The Appellant also filed a counterclaim in which he was seeking damages and costs incurred as a result of the Respondent's action.

C. Trial Court's Decision

6. The record shows that upon a full hearing of the suit at which the parties testified on their own behalf the trial court found for the Respondent. The court held that the Respondent had proved her claim on a balance of probabilities hence she was entitled to the reliefs sought in the suit. As a consequence, the court entered judgment for the Respondent as prayed in the plaint save for damages for trespass which the court found had not been proved. The Respondent was also awarded costs of the suit. The court thereupon dismissed the Appellant's counterclaim for lack of merit.

D. Grounds of Appeal

7. Being dissatisfied with the said judgment the Appellant filed a memorandum of appeal dated 03.03.2023 raising the following 9 grounds of appeal:

a. That the trial magistrate erred in law on 16.02.2022 in proceeding to hear the suit which she had earlier dismissed.

b. That consequently the proceedings from then on were null and void as a trial court has no jurisdiction to set aside its orders without a valid application having been made as provided for under the Civil Procedure Rules, 2010.

c. That the trial magistrate erred in law and fact in finding that the Appellant sold two plots to the Respondent without taking into account the following factors:

i. That the alleged agreement made in 1995 between the parties in Ndungu Ngunjiri Advocate's office was not exhibited.

ii. That the alleged deposit of Kshs.15,000/= made to Ndungu Ngunjiri Advocate was neither in favour of one David Wakahora nor the Appellant but was a deposit towards legal fees in respect of a transaction which was not specified in the payment receipt.

iii. That the authority of the letter of 20.06.2007 relied upon by the Respondent was not proved on a balance of possibilities and the same was in fact addressed to Teresia Wamaitha Kanyingi and not the Respondent.

iv. That neither Gakuru Advocate nor one Simon Kamau Mwangi who allegedly witnessed the agreement of 21.03.2007 were not called as witnesses to prove the authenticity of the said agreement, and the same did not specify the property which was being sold and the manner in which the consideration was made and in fact there was no proof of acknowledgement of payments.

v. That the trial court did not take into account and completely disregarded the provisions of the law of contract and Land Control Acts; and generally did not critically analyze the evidence of the parties and weigh the same against each other.

d. That the trial magistrate erred in relying on the photographs produced by the Respondent without further proof of the existence of contracts of sale.

e. That the trial court erred in assessing costs and issuing a certificate of costs without giving the Appellant an opportunity to be heard during the assessment of costs.

f. That the trial magistrate erred in failing to resolve in favour of the Appellant the contradictions and inconsistencies in the evidence of the Respondent.

g. That the trial magistrate erred in failing to appreciate that non production of all pages of the title of the suit land was not fatal to the Appellant's case and the Appellant will seek to produce all pages of the title deed in respect of the suit land; and further the trial court erred in holding or finding that the Appellant had fraudulently obtained the title to the suit land and defrauded the Respondent of her land.

h. That the trial court erred on the burden of proof, and the judgment was consequently bad in law and fact and against the weight of evidence.

i. That the trial magistrate erred in proceeding with the case, when it was proved that there was a similar case, involving the same suit land, and parties in the High Court being Nyahururu ELC No. 006 of 2021 – Jeniffer Wamaitha Kanyingi -vs-Leonard Githui Muriithi.

8. As a result, the Appellant sought the following reliefs in the appeal:

   a. That the appeal be allowed.

   b. That the judgment and decree of Hon. P. Gichohi (CM) dated 18.05.2022 be set aside.

   c. That the Appellant be awarded costs of the appeal and the suit before the subordinate court.

   d. That the court be pleased to grant any other or further relief as it may deem just.

E. Directions on Submissions

9. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that none of the parties had filed submissions by the time of preparation of the judgment.

F. Issues for Determination

10. Although the Appellant raised 9 grounds in his memorandum of appeal, the court is of the opinion that the issues for determination may be summarized as follows:

    a. Whether the trial court erred in law and fact in allowing the Appellant's suit.

    b. Whether the trial court erred in law and fact in dismissing the Appellant's counter-claim.

    c. Who shall bear costs of the appeal.

G. Applicable Legal Principles**

11. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page126 as follows:

    > " ...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

    > " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine

whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion…"

13. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows:

> " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

14. In the case of Kapsiran Clan -vs- Kasagur Clan [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether the trial court erred in law and fact in allowing the Respondent's suit

15. The court has considered the material and submissions on record on this issue. It is evident that the trial court allowed the Respondent's claim because it was satisfied that she had proved her claim against the Appellant on a balance of probabilities. The Appellant faulted the trial court for, inter alia, failing to hold that there was no valid suit at the time since it had been dismissed earlier on; that the existence of the sale agreements was not adequately proved; that the agreements relied upon were null and void

for want of the consent of the Land Control Board; and that there were various contradictions and inconsistencies in the Respondent's evidence. The Appellant also faulted the trial court for deciding the case against the weight of evidence and for proceeding with the suit during the pendency of a similar suit before the Environment and Land Court being Nyahururu ELC No. E006 of 2021 between the same parties.

16. That perusal of the original record of the trial court reveals that vide an undated notice of motion filed on 22.03.2021 the Appellant sought dismissal of the Respondent's suit for want of prosecution. In particular, it was contended that the Respondent had failed to comply with a court order dated 29.01.2019 which required the parties to complete their pleadings and set down the suit for hearing. The record shows that vide a ruling dated 26.05.2021 the court dismissed the said application with no order as to costs. There is no indication in the court file to show that the Respondent's suit was ever dismissed at any given time.

17. The court is not satisfied that there is merit in the ground relating to the existence or pendency of Nyahururu ELC No. E006 of 2021. The record shows that the suit before the trial court was filed in 2019. If the Respondent thereafter filed another suit before the Environment and Land Court in 2021, it was upon the Appellant to apply for a stay for the latter suit as provided for under Section 6 of the *Civil Procedure Act* (Cap.21). It was not for the trial court to stay the suit which was filed earlier in time.

18. The Appellant submitted that the sale agreements in issue were null and void for want of consent of the land control board. In the first place, there was no evidence before the trial court to demonstrate that the suit property was agricultural land or that it was located in a controlled area. The Respondent's evidence was that she bought two plots each measuring 50 feet x 100 feet. There was no evidence to show that they constituted agricultural land in a controlled area. It was upon the Appellant to adduce the relevant evidence before the trial court.

19. The court has considered the material on record on the existence of the 2 sale agreements which the trial court relied upon. The court is of the view that this issue goes into the trial court's assessment of the evidence and of the credibility of the witnesses. The Respondent's evidence was that she bought the 2 plots in 1995 and 2007 respectively and paid the purchase price through an advocate called Ndungu Ngunjiri who was deceased by the time of trial. The Appellant's evidence was that he had never sold any plot to the Respondent and that he was never paid the purchase price. The trial court was certainly faced with contradictory evidence and had to determine whom between the two parties were to be believed. The trial court had the benefit and advantage of seeing and hearing the witnesses at the trial. The trial court found the Respondent to be a credible witness and believed her evidence. The court cannot lightly interfere with that finding of the trial court unless there are good grounds for doing so.

20. In allowing the Respondent's claim the trial court concluded as follows:

> " 33. The Defendant is referred to as a broker by the Plaintiff's evidence. He does not deny it. He does not deny that the Plaintiff has been in possession of the said land to date and has developed it. The Defendant who claims the land does not say when he realized that there were people including the Plaintiff occupying his land. He is very economical with information. He did not file a suit against the Plaintiff for orders for eviction. His defence is a mere denial and his purported counter-claim is a sham.
>
> 34. The only conclusion here is that the Defendant herein, in conjunction with one David Manjari Wakahora, was actively involved in the alleged sale of the plots in 1995 and 2007 when the land could be (sic) belonging to the

> Government at the time. The money certainly changed hands from the Plaintiff to the Defendant and one David through the late advocate towards the purchase of these two plots. No beacons were put but the Defendant marked the extent of the land he had sold to the Plaintiff. He is the one who put the Plaintiff in possession of the said plots”

21. The court finds no fault with the trial court’s finding and holding that the Respondent had proved her claim against the Appellant on a balance of probabilities. The court finds it strange that the Appellant did not take any legal steps to evict the Respondent from the two plots for over 20 years if he was truly unaware of the basis upon which she had occupied and settled thereon. The Appellant only filed a counterclaim on 27.01.2021 more than 25 years after the agreement of 1995 and 14 years after the second agreement. There was no indication that the Appellant had ever reported the alleged forgery of his signature and sale agreements to law enforcement agencies for investigation. In the premises, the court is unable to interfere with the trial court’s decision in allowing the Respondent’s claim.

b. Whether the trial court erred in law and fact in dismissing the Respondent’s counterclaim

22. The court has considered the material on record on this issue. It is evident that the Appellant’s counter-claim was not properly pleaded as required under Order 2 rules 1- 4 of the Civil Procedure Rules, 2010. The Appellant simply prayed for costs and unspecified ‘damages’ against the Respondent without pleading any factual basis for those prayers in the counter-claim. He did not even pray for an eviction order against the Respondent. It is thus strange that the Appellant was expecting to be awarded damages at large without pleading the material facts in the counterclaim which would have entitled him to such damages. The court finds no fault with the trial court’s decision to dismiss the Appellant’s counter-claim.

d. Who shall bear costs of the appeal

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Respondent shall be awarded costs of the appeal to be borne by the Appellant.

I. Conclusion and Disposal Orders

24. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. As a result, the Appellant’s appeal be and is hereby dismissed with costs to the Respondent.

It is so decided.

Judgment dated and signed at Nyandarua and delivered in the presence of the parties this 20th day of June, 2024.

In the presence of:

Leonard Muthui the Appellant present in person in open court

Jeniffer Wamaitha the Respondent present in person in open court

C/A - Carol

....

Y. M. ANGIMA

JUDGE

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